Supreme Court, U.S.
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82-309

No.

Supreme Court of the United States

IN THE

OCTOBER TERM, 1982

MARY K. SMITH, HELEN FOLEY,
and JOSEPH SHANAHAN
Appellants,

vs.

S. DAVID BRANDT
~~P. PAUL RICCI~~, President
STATE BOARD OF EDUCATION
and FRED G. BURKE,
Commissioner of Education,
Respondents

ON APPEAL FROM THE NEW JERSEY SUPREME COURT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the inclusion of an excusal period on grounds of conscience in a state regulation mandating a Family Life Education program dispositive of appellants' claim of indirect coercion by the state as inhibiting the free exercise of religion thereof?

2. Did the Supreme Court of New Jersey err in holding that the action of the Board of Education in adopting the regulation does not violate the Due Process Clause of the Fourteenth Amendment?

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ON APPEAL FROM THE NEW JERSEY SUPREME COURT

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the New Jersey Supreme Court dated 25 May, 1982 and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The decision of the Supreme Court of New Jersey appears in the Appendix hereto at Appendix A. (89 *N.J.* 514)

JURISDICTION

This is an appeal from a regulation of the New Jersey State Board of Education, mandating a family life education program (sex education) into the state curriculum (*N.J.A.C.* 6:29-7.1), as violative of the First and Fourteenth Amendment to the United States Constitution which relief sought was denied by the New Jersey Supreme Court. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by U.S.C. Sec. 1257 (2). The following decisions sustain such jurisdiction to review: *Largent v. Texas*, 318 *U.S.* 418, 63 S. Ct. 667, 87 L.Ed. 873; (1942) *Lawrence v. State Tax Commission*, 287 *U.S.* 276, 282,3, 52 S. Ct. 556, 76 L.Ed. 1102; (1931) *Hamilton v. University of California*, 293 *U.S.* 245 79 L.Ed. 343, 55 S. Ct. 197 (1934.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Fourteenth Amendment, United States Constitution:

> "1. . . . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

N.J.A.C. 6:29-7.1 which is the subject regulation appears in the Appendix hereto at Appendix B.

N.J.S.A. 18A:38-25 and 31 appear in the Appendix hereto at Appendix C and D.

N.J.S.A. 52:14B-4(2) appears in the Appendix hereto at Appendix G.

STATEMENT OF THE CASE

This is an appeal from the final adoption of revised rules governing Family Life Education by the New Jersey State Board of Education (hereinafter referred to as State Board) at its August 6, 1980 meeting. The appeal was certified directly to the Supreme Court of New Jersey on respondents' motion whereat decision was granted for respondents on May 25, 1982.

The matter stems from earlier action by the State Board when in 1967 it adopted a policy on sex education which recommended but did not require that each local board of education include a sex education program in its curriculum. In January, 1979, the State Board appointed a committee of its membership to restudy the problem. Upon completing its review, the committee submitted its report to the full membership at its August 8, 1979 meeting. Their recommendations were that: (See Appendix E).

1.) the study of family life education be required as part of the health curriculum.

2.) the state regulations provide for an excusal period for sex education portion when based on parental grounds of conscience.

3.) districts provide appropriate services to assist pregnant teenagers and teenage parents.

4.) the Department of Education prepare, for consideration by the State Board, regulatory proposals to implement the Committee's recommendations.

The State Board unanimously accepted the committee's report and specifically adopted each of the recommendations at that meeting.* On February 6, 1980 the first public hearing on the above regulation was held by the State Board and on March 6, 1980 such proposed rules were published in New Jersey Register. On April 8, 1980, June 11, 1980 and on August 6, 1980 other public hearings were held on revisions to these rules. The revisions were adopted and an official copy of them was filed with the Office of Administrative Law, Division of Administrative Procedure on August 7, 1980 calling for the implementation of the program to be completed by September, 1983.

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*At page 3 of respondents' brief in the State Court it states: (. . . at its August 8, 1979 meeting) "The State Board unanimously accepted the Commissioner's report and specifically adopted each of its recommendations."

Appellants are citizens and taxpayers of the State of New Jersey who presented written statements in opposition to the above regulations and revisions and then filed an appeal in the Superior Court, Appellate Division, charging that the regulation violated individual constitutional rights guaranteed under the First and Fourteenth Amendments and also certain procedural requirements under the State Administrative Procedure Act.

RAISING THE FEDERAL QUESTION

At the earliest stage possible, in the appeal to the Appellate Division, appellants raised the claim that the rules as adopted by the State Board of Education violated the "Establishment of Religion" and "Free Exercise" Clauses of the First Amendment as well as the "Due Process" clause of the Fourteenth Amendment. The Supreme Court of New Jersey affirmed the action of the State Board of Education and denied those claims.

THE QUESTIONS ARE SUBSTANTIAL

The basic substantive issue involved in this appeal is of great public interest having to do with State mandating of sex education programs over citizen objections of their coercive effect on the "Free Exercise of Religion" and is similar to ones raised and settled in several States on the basis of having included in the regulations excusal clauses for reasons of conscience. The instant decision cites decisions of the Supreme Court of Hawaii [*Madeiros v. Kiyosaki*, 52 *Ha* 436, 478 P 2d 3124 (1970)] and California Court of Appeals [*Citizens for Parental Rights v. San Mateo County Board of Education*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (Ct App. 1975), 2 appeal dism. 425 *U.S.* 908], as reason for rejecting appellants' argument that the excusal period furnished no defense to a claim of unconstitutionality under the First Amendment. Thus, it is clear that State Courts of the highest level are setting a precedent on this federal question of great public importance which appellants contend is erroneous and should be settled at the highest federal level.

In support of this appellants present the following propositions:

ARGUMENT

POINT ONE

THE SUPREME COURT OF NEW JERSEY ERRED IN HOLDING THAT, BECAUSE OF THE EXCUSAL CLAUSE, THE REGULATION OF THE STATE BOARD OF EDUCATION DOES NOT VIOLATE THE FREE EXERCISE OF RELIGION CLAUSE OF THE FIRST AMENDMENT.

The holding of the New Jersey Supreme Court is as follows:

> "Thus, appellants' argument based on the Free Exercise Clause is flawed in two ways: *First*, the regulation, because of the excusal clause, does not inhibit the free exercise of religion. *Second*, to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause."

Appellants' argument in opposition to this conclusion is:

A. *As to the First Point of the holding:*

The First Amendment to the United States Constitution states in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

and in *Cantwell v. Connecticut*, 310 *U.S.* 296, 84 L.Ed. 1213, 60 S. Ct. 900 (1940), it states at 303:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws . . ."

thereby making First Amendment prohibitions applicable to state legislative actions.

The New Jersey State Board of Education adopted the provisions of the Family Life Education Program (N.J.A.C. 6:29-7.1) which were filed and made effective on April 17, 1980 with amendments becoming effective on August 7, 1980. (Appendix B) Attendance at such courses is mandated for children of school age (N.J.S.A. 18A:38-25) with sanctions on parents who fail to comply with above statute. (N.J.S.A. 18A:38-31) (Appendix C-D)

In his opening statement at the first hearing on the Family Life Education Program (N.J.A.C. 6:29-7.1) on February 6, 1980 Commissioner of Education Fred G. Burke stated: (Appendix F)

> "You have before you a proposal for Administrative Code that requires family life programs in all school districts.
>
> In January of last year the Board formed its committee on this issue. In August the committee released its report. *These rules are based on the recommendations of the committee."*
>
> (emphasis added)

The basis and guiding rationale for this regulation is to be found in the recommendations of the five member committee of the New Jersey Board of Education as listed in the "Report of the Family Life Committee of the New Jersey State Board of Education" which recommendations were adopted by the Board at its August 6, 1979 meeting (Appendix E) and are listed at (A18a).

Appellants contend that the most objectionable parts of the program is embodied in that particular phrase listed in the recommendations as, ". . . to discuss the advantages and disadvantages of becoming sexually active at an early age and . . .". (A18a) which subject matter, being of scandalous behavior on its face, is not discussionable at all from appellants' moral viewpoint because it represents a violation of the Ten Commandments (Commandment on adultery) which is central to the beliefs of the Judeo-Christian religious community and is of such common knowledge by all that judicial notice may be taken of it pursuant to Federal Rule 201 (d). In effect, by such mandate,

State power is operating against the student with such religious belief by coercing him or her into a situation which could be an occasion for sin.

Appellants further contend that, basically, their argument on this point is supported by the Yoder case. (*Wisconsin v. Yoder*, 406 *U.S.* 205, 92 S. Ct. 1526, 32 L.Ed. 2d 15 (1972). This was a similar case under the Free Exercise Clause involving the right of members of the Amish religion to refuse to send their children to school after completing the eighth grade in the face of a state compulsory school attendance law requiring such attendance to age sixteen. The Amish position was that formal high school education beyond the eighth grade was contrary to their beliefs, while the State's was that the child must be protected from ignorance fostered by the parent.

The Court held at 214:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, . . .
>
> . . . . . .
>
> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

Appellants maintain that their position is stronger than that of respondents in the Yoder case, supra, wherein the Court sustained the claim that attendance at a routine secular curriculum containing no religious connotations in itself interfered with their religious beliefs. In the instant case the mandated subject matter, as portrayed in the above recommendations is on the face of it flagrantly offensive to the central religious beliefs of believing

students, and is widely known to be so. Further evidence of its known affront to religious beliefs is manifested by the fact of the incorporation of an excusal policy in the initial proposal for reasons of parental grounds of conscience, whereby the State, by so attempting to wash away the stain of its own hindering of the Free Exercise of Religion, admits the immoral nature of the program. Because the State has included the excusal policy for reasons of conscience, according to Yoder it must show an interest of sufficient magnitude to override the claim of First Amendment violation — in the absence of proof that the requirement does not deny such right. The State Board's position has been that it does not violate that right because of the excusal policy which was upheld by the Supreme Court of New Jersey, which holding is erroneous and incomplete in that it depends solely on the excusal clause being dispositive of the issue of indirect coercion and makes no attempt to discuss the balancing standard as required by Yoder. So pointed was its confidence in the decisions of the other State Courts being a complete rebuttal to the point that the Court stated that the reasonings of appellants' on the matter was not included in the decision. (A6a).

Let us consider, then, the circumstances of the two decisions of the State Courts of Hawaii and California and see whether such reliance on them has that quality of certainty as to preclude the applicability of the balancing criterion of the Yoder case. The Medeiros case (*Medeiros v. Kiyosaki*, 52 *Ha* 436, 478 P 2d 314 (1970) was decided prior to the Yoder case and was made on the basis that because of the excusal clause there is no direct governmental compulsion involved. It rejected the indirect pressure on students to attend such courses, as was recognized in the Abington case, (*Abington School District v. Schempp*), 374 *U.S.* 203, 83 S Ct. 1560, 10 L.Ed. 2d 844 (1963) but the reasoning for not applying it was not clearly set forth. It cited contradictory statements of Justices Brennan and Douglas in each of their concurring opinions on the point of whether the excusal policy ruling should also apply in Free Exercise complaints but the reasoning did not seem conclusive. This in turn became the basis for the California decision (*Citizens for Parental Rights v. San Mateo*

County Board of Education), C.A. 3d 1, 124 Cal. Rptr (1975) which excluded the introduction of the Yoder case into the argument by stating at 14:

> "Contrary to the contentions of the parents and amicus curiae the issues presented in Yoder did not necessarily require a trial on the merits and the case is not good authority for the contention that their amended complaint has alleged any cause of action. While it is repeatedly asserted that the program in issue here provides an interference with the free exercise of religion similar to that of Yoder, no part of the lengthy complaint specifically so alleges."

The question was finally disposed of on procedural grounds by affirmance of the county's motion to dismiss.

Thus, appellants contend that a review of the argument relative to the excusal clause will disclose weaknesses in the conclusions of the cases cited which indicate that it may be a mistake to dismiss the issue on that basis alone without regard to the Yoder requirement as to the balancing of interests. The State has not shown any overriding interest for the regulation and from the evidence and statistics submitted will certainly find itself hard pressed to do so, if required. There appears to be hardly a rational relationship to some colorable state interest let alone one of paramount importance.

In fact, all of the statistics of the Report cited in the Decision (A2a) are irrelevant to this issue and are mute evidence that the proposed program is not the proper vehicle to achieve the results desired, even if the State could show some overriding interest which, up to this point, it has not. Its interest in universal compulsory education is by no means absolute to the exclusion of subordination of all other interests.

Let us further consider the logic of the program.

How can the increases in teenage sexual activity, teenage pregnancy and venereal disease reasonably be expected to be lessened or prevented by a sex education program;

a. in which the Committee recommending it ". . . pointed out that no research studies had been found that showed a correlation between teaching about human sexuality and a reduction in teenage pregnancy or venereal disease." (A2a) and,

b. which includes the ensuring of opportunities for students to discuss the advantages of becoming sexually active at an early age. (A8a).

From the above, it not only appears that the program is inappropriate and meaningless but that it is encouraging the very mischiefs it is supposedly seeking to prevent.

B. *As to the Second Segment of the holding:*

> ". . ., to permit the appellants to control what others may study because the subject may be offensive to appellants' religious or moral scruples would violate the Establishment Clause."

it is factually inaccurate and legally incomplete.

It is incorrect to conclude that appellants are trying to control what others may study when the record of the oral hearing before the Supreme Court of New Jersey will show that, under questioning by the Chief Justice, they had no objection to the State having an alternative program which would be elective on an individual basis but the Attorney General refused in the name of the State Board of Education.

It is legally incomplete because the Court is implying an overlapping of the two clauses but does not discuss it as a problem nor explain how the State would be violating the Establishment Clause except to cite its reasoning: (A8a)

> "The Court in Epperson, (*Epperson v. Arkansas*, 393 *U.S.* 97, 89 S Ct. 266, 216 Ed 2d 228 (1968) held that the prohibition of teaching one point of view (Evolution) because it was contrary to the religious views of

> some constituted an impermissible establishment of religion. Appellants' argument is essentially the same as the one rejected in Epperson."

In addition to the fact that Epperson did not involve the problem of an overlapping of the clauses, neither appellants' argument nor the situation is the same. In Epperson the State was attempting to prohibit the teaching of a certain point of view in education with no justification other than the religious views of some of its citizens which is a clear violation of the First Amendment. In this case the State is mandating the teaching of a completely new subject as a health measure that is a radical departure from that normally attributed to accepted health curricula in public school education; and which subject, from its very nature, denigrates religious principles thereupon resulting in widespread claims of violation of the free exercise of religion. In the instant case no other person's religious liberties is infringed upon nor is there any attempt to blot out any particular segment of scientific theories in education, nor even to keep the matter out of the curriculum — except as a statewide mandate. If the above conclusion were universally valid from the facts shown it would be impossible to succeed in asserting any such constitutional right, no matter how legitimate and compelling the circumstances might be.

Therefore, appellants contend that the interposition of the excusal policy in the instant case as a complete bar to the claim of protection under the Free Exercise of Religion Clause has not been finally established until this Court has so held and that the holding of the New Jersey Supreme Court is in error for the above stated reasons.

POINT TWO

THE SUPREME COURT OF NEW JERSEY ERRED IN HOLDING THAT THE ACTION OF THE BOARD IN ADOPTING THE REGULATION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment states in pertinent part:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

In *Meyer v. Nebraska*, 262 *U.S.* 390, 67 L ed. 1042, 43 S. Ct. 625, (1922), relative to the liberty guaranteed in the Fourteenth Amendment it held at 399:

> "Without doubt it denotes, not merely freedom from bodily restraint but also the right of the individual to contract, . . . to marry, establish a home and bring up children, *to worship God according to the dictates of his own conscience*, . . ."
>
> (emphasis added)

Appellants are claiming that their right to the free exercise of religion is being impinged upon by the State Board of Education in mandating this Family Life Education program (N.J.A.C. 6:29-7.1) as a part of the health education curriculum in the public schools of New Jersey.

The procedural authority for the State Board's rule making power is stated in N.J.S.A. 52:14B-4 (State Administrative Procedure Act) which states in part:

> "52:14b-4. Notice and Hearing
>
> (a) Prior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided the agency shall:

> (1) . . . . . .
> (2) Afford all interested persons reasonable opportunity to submit data, views, or argument, *orally* or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule."
>
> (emphasis added)

On review of action of an administrative agency a court will pass on, and in a proper case grant relief or set aside, agency action, findings and conclusions which are arbitrary, capricious, or both or either, or an abuse of power or discretion. 2 Am Jur 2d, S.650, p. 504. In support of this it states in *First National Bank of Fayetteville v. Smith,* 365 F.Supp. 898 (1973) at 902:

> "(1) The appropriate standard for review is whether the defendant's action and holding are arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law."

"Arbitrary" has been defined as "without adequate determining principle" or "fixed or arrived at through an exercise of will or caprice, without consideration of adjustment with reference to principles, circumstances or significance, . . . decisive but unreasoned." in *United States v. Carmack* 329 U.S. 230, 91 L ed 209, 67 S Ct 252 (1946) note 14.

The entire group of words "arbitrary, capricious and abuse of discretion" as linked together have the same basic idea, that of being an excess of power, caprice, unreason and lack of rational basis. 2 Am Jur 2d, S. 651, p. 508.

Appellants maintain that the particular transgressions in this area committed by the State Board of Education which were not subjected to the exacting judicial scrutiny by the Court as recommended in *Environmental Defense Fund Inc. v. Ruckelshaus,* 439 F.2d 584 (1971)[*1] at 598 are:

[*1] "To protect these interests from administrative arbitrariness, it is necessary, but not sufficient to insist on strict judicial scrutiny of administrative action."

1. It acted in an arbitrary and capricious manner in that:

a) It accepted and adopted the program at its monthly meeting in August 1979, five months before holding the initial public hearing on the matter which evidenced an intent by that body to impose its own will on the shaping of the regulation rather than to use its judgment after hearing and considering the views of an interested public as called for in the statute.[3]

b) It depended on conjecture, belief[3] and irrelevant statistics for this new program, which is a radical departure from the accepted role normally carved out for the public schools, to achieve a result having to do with student activity outside the classroom, and freely admitting in its Committee Report that there is a lack of research studies showing ". . . a correlation between teaching about human sexuality and a reduction in teenage pregnancy or venereal disease."[4]

2. It abused its discretion in that:

a) Aside from the fact that it had made its decision in August 1979 prior to calling the witnesses in February 1980 which effectively closed the door on any meaningful opportunity by the public to be heard, it further cut down on that public's right to participate by publishing inadequate notices of the hearings. Evidence of this is in the closing paragraph of the initial notice of publication in the March 6, 1980 issue of the New Jersey Register, as stated on p. 28 of appellants' brief to the State Court:

> "Interested persons may present statements or arguments in writing relevant to the proposed action on or before March 26, 1980 to;"

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[3] At page 3 of respondents' brief in the State Court it states: (. . . at its August 8, 1979 meeting) "The State Board unanimously accepted the Committee's report and specifically adopted each of its recommendations."

[3] Page 3 of Decision

[4] Page 4 of Decision

It is apparent on the face of it that it does not comply with the requirements of the statute (N.J.S.A. 52:14B-4) in that it does not allow for oral participation and could have a chilling effect on potentially interested persons throughout the State who, upon reading that notice after March 26th, would interpret it as foreclosing their opportunity to offer their views on the matter.

b) The transcripts of the hearings show that the board members made no attempt to debate the issues among themselves or to weigh the considerations except in a very general way. The basic hearing on April 8, 1980 lasted from morning until 10:30 PM and immediately at the close of the public session voted to adopt the regulation, nine to one. No discussion is listed as to the particular benefits of the rule outweighing those harms which might ensue, as depicted by the speakers in opposition to adoption. Some of those apprehensions which were concertedly expressed were; the effect of the mandate on religious freedom, the ineffectiveness of the excusal policy in mitigating the State's hampering of religion, the absence of any solid evidence of linkage between the program and the abatement of the mischiefs it purported to correct and the problem of how the program would be exposed to the children in light of their varying degrees of sensitivity to the subject matter. None of these was addressed by any board member in any detail, if at all.

It is obvious that the Board members did not follow the administrative rules of fair play nor the State statutory requirement that it "... consider fully all written and oral submissions respecting the proposed rule.", but instead, acted arbitrarily, capriciously and in abuse of their discretion by imposing their own wills and beliefs in fashioning this rule rather than fully and objectively considering the total input. The Supreme Court of New Jersey, having evidence of all of the above before it, erred in not setting aside the Board's action on the ground that it was clearly wrong. This is corroborated in *First National Bank of Fayetteville v. Smith*, Supra at 911: (citing in Hughes Air Corp. v. Civil Aeronautics Board, 482 F2d 143 (1973)

> "However, we may set aside agency action which is arbitrary or an abuse of discretion if 'this court should be

of the opinion that (the) action was clearly wrong' . . .
We are convinced that these orders were clearly wrong and therefore they are unenforceable."

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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August 20, 1982.

(Appendices Follow)